IRRIGATION LAWS OF CALIFORNIA

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with
Compliments of
James A. Waymire

THE IRRIGATION LAWS OF CALIFORNIA.

OPINION AS TO THE SCOPE AND EFFECT

— OF —

JUDGE ROSS' DECISION

— IN THE —

FALLBROOK CASE,

— BY —

HON. JAMES A. WAYMIRE

OF THE SAN FRANCISCO BAR,

Ex-Judge of the Superior Court.

OPINION

OF

HON. JAMES A. WAYMIRE

AS TO THE

DECISION OF JUDGE ROSS

IN THE

FALLBROOK CASE.

I am requested to express an opinion in reply to the following questions:

1. What was decided by Judge Ross in the case of *Bradley et al.* vs. *Fallbrook Irrigation District?*

2. What is the legal effect of such decision upon the bonds issued by irrigation districts?

3. Do the decisions of the Supreme Court of the United States and other authorities indicate that Judge Ross will be sustained?

In the case referred to, the complainants filed a bill in equity, representing themselves to be the subjects of the kingdom of Great Britain, and seeking to quiet title to certain lands claimed by them within the district as against

an alleged cloud arising by reason of a threatened sale for a delinquent assessment levied by the directors of the district; also to enjoin the execution of a deed by the collector pursuant to such sale, and also to have adjudged void certain bonds proposed to be issued by the directors.

The bill sets out the proceedings for the formation of the district, including the presentation of the petition to the Supervisors of the county, which the law requires to be signed by "fifty or a majority of those holding title or evidence of title to the lands within the proposed district." It concedes the regularity of the proceedings under the statute, but avers that the statute itself is void because in conflict with the Fourteenth Amendment to the Constitution of the United States, in that it attempts to deprive landowners of their property without due process of law; alleges that the Supreme Court of the State has declared the act valid, and, as the deed in question is by the statute made conclusive evidence of title, it will create a cloud upon the land of the complainants.

The defendants demurred to the sufficiency of the bill; the Court overrules the demurrer and gives leave to answer. I understand an answer has been prepared and that a trial will be had immediately, so that final judgment can be entered and an appeal taken to the Supreme Court of the

United States in time for the next October term.

The case was not argued orally before Judge Ross, but was submitted upon printed briefs, of which there were two very elaborate ones filed on behalf of the complainants and a short one on behalf of the defendants. I have read the briefs and carefully examined all the authorities cited, with many more bearing upon the questions involved.

A close analysis of the opinion shows that the Judge decides but one question: that the "Wright Act" is in conflict with the Fourteenth Amendment to the Constitution of the United States, because it attempts to deprive the complainants of their property without due process of law, in that it does not give them an opportunity to be heard before the Board of Supervisors as to the sufficiency of the petition filed at the beginning of the proceedings for the formation of the district.

The bill does not allege that there had been any confirmation proceedings; it is silent on that subject, and the opinion is, therefore, applicable only to districts which have not been confirmed by the supplemental act of March 16, 1889 (Cal. Statutes, 1889, p. 212). By that act the Board of Supervisors of any irrigation district is authorized to commence a special pro-

ceeding in the Superior Court, asking for the confirmation of all the proceedings for the organization of the district or the issue of bonds, and in such proceeding any person interested may come in and contest the legality of all the proceedings, including the petition for the organization of the district. Referring to this act, the Judge says:

> " Such a proceeding may or may not be instituted by the Board of Directors of the district, and was not instituted in the present instance, so far as appears from the bill. No man's constitutional rights can depend upon an option which may or may not be exercised by another."

The necessary inference is that if such proceedings had been had, so that the landowner could have been heard, he would have no right to complain, because there would be, in fact, due process of law. To this effect are all the authorities, and notably the late cases of *Paulsen* vs. *Portland*, 149 U. S., p. 30, *et seq.*, and *Pittsburg* vs. *Backus*, 154 U. S., p. 421.

The Judge does not hold, as has often been stated in the public press, that the use of water for irrigation purposes is not a public use. He does say that the assessment provided for in the act cannot be sustained, either under the general power of taxation or the power of eminent do-

main, for the reason that the water acquired by the district is not distributed to the entire community within the district, but to the owners of land only who, he says, constitute but a part of the community. After discussing the applicability of the power of taxation to such a purpose, he concludes thus:

> "It does not seem to me to admit of doubt, if the act in question can be maintained at all, it must be under the power of assessment for local improvements, or, as expressed by the Supreme Court in *Wurtz* vs. *Hoagland*, 114 U. S., p. 613, 'the power of the Legislature to establish regulations by which adjoining lands held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense;' but no more than any other can that power be exercised without 'due process of law.' Not only does the legislation in question provide for the assessing and selling, and thus for the taking of private property, in order to supply water for irrigation to specific persons within the district, and to those only, but all of this is authorized to be done without affording the owner any opportunity to be heard in opposition to the validity of the proceedings."

And then he proceeds to discuss the question as to the right of the owner of lands to be heard touching the petition filed at the beginning of the proceeding, and reaches the conclusion that he is not allowed to be heard upon that matter, and, therefore, he is deprived of his property without due process.

It will be observed that the question as to the validity of the assessment is left undecided; or rather, it is conceded that it may be sustained, under the rule referred to in *Wurtz* vs. *Hoagland*, as an assessment for local improvements. Since that is the ground upon which the statute itself and all the decisions of the Supreme Court of California base the power, it is an admission that such power exists.

The Court then discusses the question as to the water supply for the Fallbrook Irrigation district, but as that is purely local, and goes to the question of a compliance with the statute only in that particular case, it is not necessary to consider it here.

As already stated, the only question actually decided is that the statute does not provide "due process of law," because it does not permit the landowner to appear before the Board of Supervisors and contest the sufficiency of the petition asking for the formation of the district; that is, whether the signers are duly qualified. This

is the full extent of the decision; all else is mere discussion, and, however interesting it may be as indicating the opinion of the Judge, it does not determine anything.

What is the legal effect of this decision upon the bonds of irrigation districts?

Until reviewed by the Supreme Court of the United States, it will have no legal effect except as it may be followed by an injunction in this particular case preventing the sale of the complainant's property. The Supreme Court of this State having decided the irrigation laws and the securities issued in accordance therewith to be valid, the courts of the State and the officers charged with duties under the statute must be governed by the decisions of the Supreme Court of the State. Otherwise, there would be an unseemly conflict in authority between the State and Federal courts. Should the Supreme Court of the United States affirm the decision of Judge Ross, the State courts would then be bound by the decision. The result would be that the bonds issued by districts which have not been confirmed would be invalid unless protected by the decisions of the Supreme Court of the State under the rule of *res adjudicata*. As nearly all the districts have been confirmed and their securities recognized and

approved by the courts, the effect would be comparatively slight.

It is to be noted that two slight amendments to the law would obviate the objections raised by Judge Ross. A change of one word in the confirmation act — "may" to "shall" — would require confirmation proceedings in all cases, thus removing the objection that it is optional with the district to give the landowner a hearing as to the sufficiency of the petition.

To make the assessment conform to the opinion, it is only necessary to provide that the water shall be distributed to the landowners "and also to all the people within the district for domestic or other purposes, upon such reasonable terms as may be fixed by the Board of Directors." With these two amendments the law would be constitutional, even in the light of this opinion.

Will the Supreme Court of the United States affirm the decision?

This question opens a wide field of inquiry. It is my opinion that the decision will be reversed, for the reasons given below.

At the outset, it is to be remembered that the Supreme Court of this State, in several well-considered cases—cases that were thoroughly argued orally and in briefs by able counsel—

has sustained the constitutionality of the law in every particular.

Irrigation District vs. *Williams*, 76 Cal., 360.

Irrigation District vs. *De Lappe*, 79 Cal., 352.

Crall vs. *Poso Irrigation Distict*, 87 Cal., 140.

Board of Directors vs. *Tregea*, 80 Cal., 334.

In re Madera Irrigation District, 92 Cal., 296.

People vs. *Selma*, 98 Cal., 206.

This legislation and the foregoing decisions are in pursuance of a general policy of the State at first adopted with reference to the drainage of the overflowed lands, and subsequently applied to the reclamation of the arid lands of this State

Hager vs. *Supervisors of Yolo Co.*, 47 Cal., 222.

Dean vs. *Davis*, 51 Cal., 406.

People vs. *Williams*, 56 Cal., 647.

People vs. *La Rue*, 67 Cal., 526.

Reclamation District vs. *Hager*, 66 Cal., 54.

Reclamation No. 108 vs. *Evans*, 6 Sawyer, 567.

Hager vs. *Reclamation District No. 10*, 111 U. S., 701.

In the first case under this statute that came before the Supreme Court of the State (*Turlock* vs. *Williams*, *supra*), the Court say:

> "As was said of the drainage act, so it may be said of the one in hand relative to irrigation, that a system which has for its object the reclaiming from the desert of vast bodies of land 'may justly be regarded as a public improvement of great magnitude and of the utmost importance to the community.' It has been planned by the Legislature on the basis of 'dividing a territory to be reclaimed into districts, and assessing the cost of the improvements on the lands to be benefited.' In none of the States where such a course has been pursued 'has the power of the Legislature to cause such improvements to be made in this method ever been denied; nor do we see any tenable ground upon which it can be questioned.'"

In the same case the Court say:

> "This is not a law passed to accomplish exclusive and selfish private gains; it is an extensive and far-reaching plan by which the general public may by vastly benefited, and the Legislature acted with good judgment in enacting it."

The Turlock decision was rendered in May, 1888, more than seven years ago. Since that time

the court in all these cases has been consistent in sustaining the law, and it appears that under them bonds have been issued and the policy of the State in this matter has been thoroughly established. Large districts have been formed, become populous, acquired property of the value of millions of dollars; some have finished their works, and others have their works nearly finished.

There is no case to be found in the decisions of the Supreme Court of the United States where that court has overthrown a statute of any State under such circumstances. On the contrary, the rules by which their decisions are governed indicate extreme caution and great care not to disturb investments, vested rights and contracts based upon statutes so construed.

It is a fundamental rule of construction of the Supreme Court of the United States that a statute will not be declared unconstitutional unless it is clearly so. The rule is thus stated in a leading case:

> "It is said the act is in conflict with the Constitution of the State. It is an axiom in American jurisprudence, that a statute is not to be pronounced void on this ground, unless the repugnancy to the Constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved

in support of the enactment. The particular clause of the Constitution must be specified and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such a result is one of delicacy and to be exercised always with caution."

Township of Pine Grove vs. *Talcott*, 19 Wallace, 673.

A recognized authority upon this subject says:

"It must be evident to any one that the power to declare a legislative enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in a case where he can conscientiously, and with due regard to duty and official oath, decline the responsibility."

Cooley's Constitutional Limitations, *6th edition*, page 192.

Again the same authority says:

"The duty of the Court to uphold the statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the Legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not, at first view, seem most

> obvious and natural. For as a conflict between the statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, *that the Court, if possible, must give the statute such a construction as will enable it to have effect*" (*id.*, 218).

Another rule of construction of equal force is that the Federal courts, in construing a statute of a State, must read the statute in the light of the construction which the State courts have given it. The Supreme Court of the United States, speaking by Mr. Justice Blatchford in *Chicago etc.* vs. *Minnesota*, 134 U. S., 456, says:

> "The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this Court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. * * * This being the construction of the statute *by which we are bound* in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company."

The only modification of this rule is that where the State court has been inconsistent in its rulings, and, under its first interpretation, vested rights have grown up, as by the issue of

bonds or other commercial paper, the Supreme Court of the United States will follow the first interpretation and disregard the later.

This is illustrated in a large number of cases arising out of statutes passed by some of the Western States, authorizing aid to railroads built and owned by private corporations. In some of those States, before the bonds had been issued and gone into circulation, and before the railroads had been built, the Supreme Courts of the States at first sustained them, but subsequently reversed their rulings and held that, as the aid was given to private corporations, the use was not a public use for which the power of taxation could be employed. In such cases, the Supreme Court of the United States uniformly sustained the bonds, holding that the use was a public use. In one of these cases the Court says :

> " The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, so far as we are advised, in unenviable solitude and notoriety. However, we may regard the late case in Iowa as affecting the future ; it can have no effect upon the past. ' The sound and true rule is that, if the contract, when made, was valid by the laws of the State as then expounded by all departments of government, and admin-

istered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of the Legislature, or a decision of its courts altering the construction of the law.' The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. To this rule, thus enlarged, we adhere. It is a law of this Court, which rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case. Bonds and coupons like these, by universal commercial usage and consent, have all the qualities of commercial paper."

Gelpcke vs. *City of Dubuque*, 1 Wallace, 206.

In another case the same rule was thus expressed by the same Court:

"This Court has always ruled that if the contract, when made, was valid under the Constitution and laws of the State, as they have been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action of the Legislature or the judiciary will be regarded by this Court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have the right

> to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule."
>
> *Wolcott* vs. *The Supervisors*, 16 Wall., 690.

Bearing in mind these views of the Supreme Court, I will proceed to consider the questions discussed by Judge Ross in his late opinion.

As already stated, the only question actually decided is that of "due process." He says the law is in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall deprive any person of his life, liberty or property "without due process of law." This conflict, he says, arises in this way:

> "The act provides, as a condition precedent to the organization of the district, the presentation to the Board of Supervisors of the county in which the lands, or the greater portion thereof, are situated, at a regular meeting of such board, of a petition signed by fifty or a majority of the holders of title or evidence of title to lands susceptible of one mode of irrigation from a common source and by the same system of works, as shown by the equalized county assessment roll next preceding the presentation of the petition, which petition shall specifically describe the proposed boundaries of

the district, and ask that it be organized under the provisions of the act. * * * Without the required petition, no step could be taken looking to the organization of the district here in question. It was jurisdictional in the strictest sense. Two weeks' notice of the time of the presentation of the petition is required to be given by publication. When presented, the statute declares, the Board of Supervisors 'shall hear the same and may adjourn such hearing from time to time, not exceeding four weeks in all, and, on the final hearing, may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries; provided the said board shall not modify such boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petition which is susceptible of irrigation by the same system of works applicable to other lands in said proposed district, nor shall any of the lands which will not, in the judgment of said board, be benefited by said system, be included within such district; provided that any person whose lands are susceptible of irrigation from the same source may, in the discretion of the board, upon application in writing to said Board, have such lands included in such district.'

"Notwithstanding the fact that the petition is, by the statute, made the basis of the

proceeding which is to culminate in divesting the title of the owner of land against his consent, there is here not only no opportunity afforded such owner to test the sufficiency of the petition, but the power of the Board of Supervisors is in terms limited to making such changes in the boundaries proposed by the petitioners as it may deem proper, subject to the condition that it shall not except from the operation of the act any territory within the boundaries proposed by the petitioners which is susceptible of irrigation by the same system of works applicable to the other lands in said proposed district, nor include within the boundaries, which it is required to establish and define within four weeks after the presentation of the petition, any lands which, in its judgment, will not be benefited by irrigation by the same system of works. Every one must admit that in the matter in question the Board of Supervisors has only such power as is expressly or by necessary implication conferred upon it by the statute itself. Not only is it not thereby given the power to inquire into the sufficiency of the petition, but the expressed statutory requirements preclude any such inquiry by it, at the instance of any owner of land adversely affected, or at all. Yet, the petition may not have been signed by the required number of holders of title, or evidence of title, to lands within the district, and, if not, there

was no basis upon which the proceedings could rest.

"Whatever construction might otherwise be placed upon the word 'hear' used in the statute, it cannot be held to include the power to determine the entire merits of the petition, in view of the affirmative requirement contained in the same sentence that on its final hearing the Board 'shall establish and define such boundaries.' The Board is of necessity required to determine for itself whether the petition upon its face is sufficient to put its powers in motion; yet its determination in that respect is not conclusive upon any one. As said by Judge Bronson, in speaking of a similar petition, in *Sharp* vs. *Spier*, 4 Hill, 88: 'They could not make the occasion by resolving that it existed. They had power to proceed if a majority petitioned, but without such a petition they had no authority whatever. They could not create the power by resolving that they had it.' The statute does not require or authorize the Board of Supervisors to hear any contest in respect to the truth of the allegations of the petitions, further than is implied by the provisions that it make such changes in the proposed boundaries as it may deem proper. Had it been empowered to entertain a contest, for example, by a landowner in respect to the question whether those signing the petition were, in truth, the holders of title,

or the evidence of title, to land susceptible of one mode of irrigation from a common source and by the same system of works, and it should find in favor of the contestants upon that issue, it would necessarily be obliged to deny the petition and dismiss the proceedings. Yet, so far from that course being allowed by the statute, it provides, as has been seen, that the Board of Supervisors shall hear the petition, and may adjourn such hearing from time to time, not exceeding four weeks in all, and, in express terms, declares that on the final hearing of such petition it may make such changes in the proposed boundaries as it find to be proper, and shall establish and define such boundaries.

"After the Board of Supervisors shall have so established and defined the boundaries of the proposed district, and shall have divided into divisions, the board is, by the statute, required to give notice of an election to be held in such proposed district for the purpose of determining whether or not the same shall be organized under the provisions of the act. The notice is required to describe the boundaries so established, and to designate a name for such proposed district. In the event two-thirds of the votes cast at such election are in the affirmative, the Board of Supervisors is, by the statute, required to declare, by an order entered on its minutes, such territory duly

organized as an irrigation district under the name and style theretofore designated, and to declare the persons receiving respectively the highest number of votes for the several offices to be duly elected thereto, and to cause a certified copy of such order to be immediately filed for record in the office of the county recorder of each county in which any portion of such land is situated, and to also immediately forward a copy thereof to the clerk of the Board of Supervisors of each of the counties in which any portion of the district may lie. And the statute declares that from and after the date of such filing the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices upon qualifying according to law, and shall hold their respective offices until their successors are elected and qualified. The organization of the district is thus completed according to the statute, without at any time or place affording the owner of the land within the boundaries of the district the opportunity to question or contest the sufficiency of the petition which lay at the very foundation of the whole proceedings.

After the organization of the district has been so completed, its subsequent management and control is, by the statute, placed in the hands of the officers of the district, whose assessor is required to annually assess

all the land within the district to pay the costs of the irrigation works, the salaries of its officers, etc., and the principal and interest of such bonds of the district as may have been authorized to be issued, and which, by the statute, are made a lien upon all the lands within the district. The assessment so made, is, by the statute, required to be equalized by the Board of Directors of the district, sitting as a board of equalization, notice of which is required to be given by publication, which board is required to meet at the time designated in the notice, and to continue in session from day to day as long as may be necessary, not to exceed ten days exclusive of Sundays, to hear and determine such objections to the valuation and assessment as may come before them. The Board of Directors, sitting as a board of equalization, is given the power to change the valuation as may be just, and its secretary is required to note all its changes made in the valuation of the property assessed, and in the names of the persons whose property is assessed. The Board of Directors is then required to levy an assessment sufficient to raise the required amount of money, which is made a lien upon the property assessed, and, in the event of delinquency, the property is directed to be sold by the collector of the district paying the assessment, and, if not redeemed within twelve months from sale, the collector, or his

successor in office, is required to execute a deed to the purchaser, the consequences atttaching to which have already been stated.

"From first to last, at no time or place, is the owner of land within the district given the opportunity to be heard in respect to the essential and all-important questions whether the petition upon which all of the proceedings rest, and under which his property is to be assessed, sold and conveyed, conforms to the requirements of the statute—whether it was, in fact, signed by fifty, or a majority, of the holders of title, or evidence of title, to the lands within the district, as shown by the last equalized assessment roll immediately preceding the presentation of the petition. Without such a petition, as has been said, no step could be taken looking to the organization of the district (*Mulligan* vs. *Smith*, 59 Cal., 206; *Zeigler* vs. *Hopkins*, 117 U. S., 688); and, of course, without a legally organized district there can be no such thing as an assessment. To say, therefore, as did the Supreme Court of California in the Madera case, that the landowner 'has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment,' does not at all answer the objection. That hearing, as stated by that Court, was limited to the question of the correctness of

the valuation placed by the assessor upon the assessed property. It did not, and could not, under the terms and provisions of the statute, reach the vital question of the sufficiency of the petition. With that, the directors of the district, sitting as a board of equalization, had nothing whatever to do. So that, under the provisions of the statute in question, the land of the individual may be assessed and sold, and, according to the averments of the bill, will, unless the Court intervenes, be conveyed and thus taken, without affording its owner any opportunity whatever to question the sufficiency of the petition upon which the whole proceedings are based. That this would be to deprive such owner of his property without due process of law would seem to be very clear. 'In judging what is "due process of law,"' said the Supreme Court of the U. S., in *Hager* vs. *Reclamation District*, 111 U. S., 708, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvement, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but, if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law."'

"Is it not arbitrary, oppressive and unjust to take one's property without affording him an opportunity to show the insufficiency of the thing that forms the basis of the proceedings under which the taking is to occur; without allowing him to show that the petition required by the statute as a condition precedent to the organization of the district; without which there could be no district; no assessment, no sales, no conveyance, never, in fact, existed? Surely, upon that vital, all-important question, the owner is entitled to be heard, and, just as surely, to take his property without affording him that opportunity, is arbitrary, oppressive and unjust. Assessments in California for the purpose of reclaiming overflowed and swamp lands, to which the Supreme Court of California, in the cases cited, liken the irrigation districts, are enforced by suits, in which, as held by the Supreme Court of the United States in *Hager* vs. *Reclamation District*, *supra*, the owner may set up, by way of defense, all his objections to the validity of the proceedings, and he is, therefore, in such proceedings, afforded 'due process of law.' In the present case, however, as has been shown, the owner whose property is authorized to be taken is not afforded any opportunity whatever, at any time or place, before any board or tribunal, to question the sufficiency of the very thing that lays at the foundation of the whole proceedings."

It will be observed that the Judge bases this opinion upon the point that the petition to the Board of Supervisors is "jurisdictional in the strictest sense," and he cites as authority *Mulligan* vs. *Smith*, 59 Cal., 206. In that case the Supreme Court of the State held that the bonds issued under the statute authorizing the opening of Montgomery Avenue were invalid because the Board of Public Works provided for in the act, and consisting of the mayor, tax collector and city and county surveyor, did not acquire jurisdiction to issue bonds. The statute provided that whenever a petition signed by the owners of the majority in frontage of the property to be charged with the costs of the improvement (opening of the avenue) should be presented to the mayor, he and the other officers should proceed to form themselves into a Board of Public Works, whose duty it should be to ascertain the cost of the proposed improvement and issue bonds to pay for the same, the bonds and the interest thereon to be subsequently paid for by an annual assessment on the property benefited. A petition purporting to be so signed was filed with the mayor, and the Board of Public Works assumed to act by issuing the bonds and opening the street. Subsequently a tax levied to pay interest became due, and Smith, who owned property charged,

neglected to pay. His property was sold to Mulligan, who, having received a deed, brought suit in ejectment to obtain possession. Smith objected to the deed as evidence on the ground that the Board of Public Works had not acquired jurisdiction to act; in other words, that the law had not been complied with. It appeared that some who had signed the petition were presidents of corporations and administrators of estates who had signed without authority. Excluding them there was not the requisite number of signers. The Court held that for this reason the law had not been complied with; the board had not acquired jurisdiction, and its proceedings were void. There was no question as to the constitutionality of the law in any respect. The same question was before the Supreme Court of the United States in *Zeigler* vs. *Hopkins*, 117 U. S., 688, and that Court sustained the decision of the State Supreme Court on the same ground, saying:

> "All we are now called on to decide is whether the presentation to the mayor of a petition, signed by the owners of less than a majority in frontage of the property to be assessed, as they were named in the last preceding annual assessment roll, was sufficient to authorize the levy of the tax for which the lots in controversy were sold, and we have no hesitation in saying it was not.

It will be time enough to consider the rights of *bona fide* holders of 'Montgomery Avenue Bonds,' if there be any, when a case arises which involves such questions."

In a similar case—the opening of Dupont street—the constitutionality of the statute was questioned upon the ground that it did not provide due process. The Supreme Court of this State sustained the law, and the Supreme Court of the United States affirmed the ruling (*Lent* vs. *Tillson*, 140 U. S., 316).

Is the petition provided for in the Wright Act jurisdictional within the meaning of the case here referred to?

Let us see.

In the Montgomery Avenue Act the only condition precedent to the issue of the bonds was the petition. There was no vote of the people interested required; no election; no other condition precedent. The sufficiency of the petition was therefore necessarily jurisdictional to the issuing of the bonds. How is it in regard to the formation of irrigation districts, and the issuing of the bonds by them? The petition must be presented to the Board of Supervisors, which is a public body—a political subdivision of the State, whose proceedings are always open to the public at meetings held regularly, as required by law.

Two weeks' notice of the presentation of the petition is required to be given. At the presentation the supervisors are required to hear the same. They are presumed to do their duty. And the courts will take judicial notice that in all the States, from the very foundation of the Government, in every county there is a similar governing board to whom petitions upon various subjects may be at any time presented. As the proceedings are always open, any citizen may appear and be heard touching such petition or any other public matter. The right so to be heard has not been questioned. The word "hear" has a well understood meaning. It signifies the right to present argument or evidence pro and con, and the subsequent determination upon such evidence and argument. This is so well known that the Legislature might well have assumed that it is understood and failed to provide specially for it. That it has been understood has been specifically decided by the Supreme Court of this State, as will be seen by reference to the case of *Central Irrigation District* vs. *De Lappe*, 79 Cal., 351, where numerous objections were raised to the petition and the form and substance of the bond accompanying it. The Court held the bond to be sufficient and the publication of the petition to be sufficient. This ruling necessarily implies the

right to be heard touching such matters, and negatives the views expressed by Judge Ross. It does more than that: it is a construction of the statute itself which binds the Federal courts.

The Court, by Commissioner Hayne, say:

> "Many objections are taken to the proceedings for the organization of the district, and the argument rests in great part upon the proposition that the proceedings are to be strictly construed. It is said the proceedings are for the purpose of divesting the citizen of his property *in invitum*. It is true that later on provision is made for assessing the property within a district. But no assessments have yet been levied and none are involved in the case before us. The objections made relate to the organization of the district. The primary purpose of such organization is to perform certain important public functions. The power of assessment, it is true, is incidental; but in the same way it is incidental to cities and other municipal corporations, so called, for the improvement of streets, etc.; and it can no more be said that for this reason proceedings for the organization of irrigation districts are for the purpose of depriving the citizen of his property *in invitum*, than the same could be said of proceedings for the organization of cities and other municipal corporations. * * * So far as proceedings for the organization are concerned, we

> think that a reasonably liberal rule of construction should be adopted to carry out the wise purposes of the law."

Judge Ross ignores this rule of liberal construction by which he should be bound, and construes the law so strictly as to deny to the supervisors any discretion to hear any one as to the sufficiency of the petition. He contends that the hearing of the petition is confined to the question of boundaries, because the law says:

> "When such petition is presented, the said Board shall hear the same, and may adjourn such hearing from time to time, not exceeding four weeks in all, and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries."

This, he says, precludes a hearing as to whether the petitioners are the "holders of title or the evidence of title." As the assessment roll is the controlling and only evidence of the fact, it is hard to see the necessity for a "hearing" on the point; and it is still harder to see how the hearing is denied even as to that. It can be so held only by applying a very technical rule.

The Supreme Court of this State had long prior to the De Lappe case construed a similar law in

the same way. In a case entitled *Hager* vs. *Supervisors of Yolo County*, 47 Cal., 228, the Court, by Mr. Justice Crocket, say:

> "In the case at bar, the petitioner appeared before the supervisors, when the proceedings for organizing the district were *in fieri*, and interposed no objection to the insufficiency of the petition, except that he proposed to include in the district his lands, which were held under a Mexican grant. Instead of taking steps promptly to arrest the proceeding, if the petition was insufficient, it does not appear that he made any movement in that direction until more than six months had elapsed, and it may be that large sums were expended in the interim in reclaiming the lands. Under these circumstances, when the petition is assailable on technical grounds, we should construe it liberally and indulge every reasonable intendment in its support. In the language of Chief Justice Shaw, even though the record should 'appear to be defective and informal when substantial justice has been done,' or 'very mischievous consequences would ensue,' or 'when the parties cannot be placed *in statu quo*,' the Court, in the exercise of a sound discretion, may deny the writ."

The Municipal Government Act of 1883 Stats. 1883, p. 94) and the Wright Act copied almost literally the language of the Reclamation

Act as to this petition. This judicial interpretation, therefore, enters into and becomes part of the statute.

In this connection it may be proper to state that I drafted the Municipal Government Act referred to, and it was passed with few changes. In performing this service I consulted the statutes and decisions of other States on the subject and found no decision holding this method of forming public corporations objectionable in any sense. That it has not been found "arbitrary, oppressive and unjust" is evident from the fact that no effort has ever been made to repeal or even to amend it in this particular.

The point that most concerns the landowner in the organization of the district is the fixing of the boundaries. He wants to know, above all things, whether his land is included or not, and it is conceded he has a hearing as to that. The sufficiency of the petition as to the signers is to be determined by an inspection of the last assessment roll. If the supervisors find the names on the roll that is sufficient. No amount of hearing could change the result. The law (section 1), says:

> "The equalized county assessment roll next preceding the presentation of a petition for the organization of an irrigation district under the provisions of this act shall be sufficient evidence for the purposes of this act."

In the recent case of *Paulsen* vs. *Portland*, already referred to, the Supreme Court of the United States sustained an assessment levied by the city of Portland upon the owners of property within the boundaries of a sewer district, although there was no law authorizing any notice to the taxpayer, saying:

> " But what was in fact done by the city? By ordinance 5068 it ordered the construction of a sewer, and directed what area should be drained into that sewer, and created a taxing district out of that area. *For these, no notice or assent by the taxpayer was necessary.* A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. *So also the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion* (*Willard* vs. *Presbury*, 14 Wall, 676; *Spencer* vs. *Merchant*, 125 U. S., 345, 355). By the same ordinance the city also provided that the cost of the sewer should be distributed upon the property within the sewer district, and appointed viewers to estimate the proportionate share which each piece of property should bear. Here, FOR THE FIRST TIME IN PROCEEDINGS OF THIS NATURE, where an attempt is made to cast upon his particular property a certain

proportion of the burden of the cost, the taxpayer has a right to be heard. The ordinance named a place at which the viewers should meet, directed that they should hold stated meetings at that place, and that all persons interested might appear and be heard by them in the matter of making the estimates. The viewers, upon their appointment, gave notice by publication in the official paper of the city of the time of their first meeting. Notice by publication is sufficient notice in proceedings of this nature (*Lent* vs. *Tillson*, 140 U. S., 316, 328). As the form of the notice and the time of its publication are not affirmatively disclosed in the complaint, it must be assumed that there was no defect in respect to these matters. The precise objection is that, although proper and sufficient notice may have been given, it was not in terms prescribed by the ordinance appointing the viewers. But, as held by the Supreme Court of Oregon in the case referred to (*Minard* vs. *Douglas County*, 9 Oregon, 206), that which is implied in the statute is as much a part of it as that which is expressed; and where a statute or an ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held, and directs that all persons interested in the matter may be heard before it, it is, as said by Judge Strahan, not a strange interpretation that it

is implied thereby that some suitable notice shall be given to the parties interested.

" But, further, the viewers made a formal report to the council of what they had done, stated they had, in accordance with the requirements of ordinance 5068, given notice by publication, and the council, in the subsequent ordinance 5162, recites that their report is satisfactory and adopted. In other words, the council, by this latter ordinance, approved the construction placed by the viewers upon the first, to the effect that it required notice. It would seem that, when notice was in fact given, notice whose sufficiency is not challenged, *a construction put by the council upon the scope and effect of its own ordinance should be entitled to respect in any challenge of the regularity of the proceedings had under the ordinance.* It is settled that, if provision is made ' for notice to and hearing of each proprietor at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law ' (*McMillen* vs. *Anderson*, 95 U. S., 37; *Davidson* vs. *New Orleans*, 96 U. S., 97; *Hager* vs. *Reclamation District*, 111 U. S., 701; *Spencer* vs. *Merchant*, 125 U. S., 345). If, before the viewers had in fact met, yet after they had published notice, the council had passed an ordinance reciting an *approval* of that act of notice, it could hardly be

doubted that the full requirements of law as to notice were satisfied. Because this approval was not made until after the hearing before the viewers, is it thereby worthless, of no validity, and can this Court say, when those proceedings have been sustained by the Supreme Court of the State, that rights guaranteed by the Federal Constitution have been stricken down, and that these individuals have been deprived of their property without due process of law?

"Now, without deciding that this notice is sufficient notice to bring the proceedings within 'due process of law,' it is worthy of remark that during the ten days of publication, made as required by said section 104 and section 2 of ordinance 5162, the plaintiffs did not challenge the regularity of the proceedings or apply to the council for an inquiry into the justness of the apportionment, nor did they commence any suit until a month after the time when warrants for the collection of delinquent assessments have been ordered by the council; in other words, only after payment has been made by a portion of the taxpayers did these plaintiffs ask any relief. Without continuing this inquiry any further, we are of the opinion that, notwithstanding the doubt arising from the lack of express provision for notice in ordinance 5068, it cannot be held, in view of the notice which was given, of the construction placed upon this ordi-

> nance by the council thereafter, and of the approval by the Supreme Court of the proceedings as in conformity to the laws of the State, that the provisions of the Federal Constitution, requiring due process of law, have been violated."

In the Falbrook case the complainant has not waited for ten days nor thirty days merely, but for years, and even now he avers that the petition is as required by law, that is, that it is sufficient in all respects. How, then, has he been injured by not having been heard? If he had appeared and been heard the result would be the same. Is it not absurd to say that he is the victim of "arbitrary, unjust and oppressive" procedure in being denied a hearing, when, by his own admission, there was no necessity for a hearing?

In a later case (*Pittsburg et al.* vs. *Backus*, 154 U. S., 421) the same court, by Mr. Justice Brewer, says:

> "It is contended specifically that the act fails of due process of law respecting the assessment in that it does not require notice by the State board at any time before the assessments are made final; and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the

individual is taken, that notice must be given at some time and in some form, before the final adjudication. But the difficulty with this argument is that it is not founded in fact. The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is not necessary. In State Railroad Tax Cases (p. 610) are these words, which are also quoted with approval in the Kentucky Railroad Tax Cases. 'This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes this is all that can be reasonably asked. Again, it is said that the act does not require the State board to grant to the railroad companies any hearing, or opportunity to be heard, for the correction of errors at any time after the assessments have been agreed upon by the board, and before they are made final and absolute, or before the final adjournment of the board; and also that it gives to the board arbitrary power to deny to the plaintiffs any hearing at any time; but the fact and the law are both against this contention. The plaintiff did appear before the board and was heard by its counsel and through its officers, and the construction placed by the Supreme Court of the State on the act—a construction which is

conclusive upon this Court—is that the railroad companies are given the right to be present and to be heard."

These cases, in my opinion, are absolutely conclusive upon the question of due process, and, if they had been brought to the attention of Judge Ross, I do not think he would have rendered the decision he did. They were not before him, however, as the briefs show.

Conceding, however, that the landowner has a right to be heard touching the sufficiency of the petition, and that the Supervisors under this act cannot hear him, there is a sufficient answer in this: that he has the same remedy under the irrigation laws that the landowner had in the Montgomery Avenue case, as decided in *Mulligan* vs. *Smith*, *supra;* he can wait until his property has been sold and he is sued in ejectment for possession, when for the first time his property is about to be taken—when he can show, if it be a fact, that the petition was not signed as required by law. It is no answer to this proposition to say that the deed is made conclusive evidence. If such a deed would operate to deprive the landowner of his property without due process of law, that part of the statute making it conclusive evidence would be void, as in conflict with the Fourteenth Amendment to the Constitution of the United States,

and it is the duty of the Court to hold an unimportant portion of the law unconstitutional rather than to destroy the whole statute. The Supreme Court of the United States, if driven to the alternative of holding this part of the statute unconstitutional, would undoubtedly so declare, rather than to destroy the whole statute and thereby disturb rights which have become vested under the law as interpreted by the State Supreme Court. Hence, in any event, the property owner has a right to be heard and has a remedy at law—"due process of law." If it be said that the action is barred by the Statute of Limitations, the answer is that, unless the property owner is himself at fault by his delay, the Statute of Limitations that would deprive him of due process would be equally void; and thus the controversy in any event would be reduced to the question as to whether the petition was in compliance with the statute. It would be a question of fact to be determined in each particular case. If the evidence should show the petition to be properly signed and sufficient in other respects in one district, that district would be held to be legally organized; otherwise, that particular district would fall. It would cease to be a question of the constitutionality of the statute as a whole, and become a question as to whether the statute had been complied with, just as in *Mulligan* vs. *Smith*.

Again, he has a plain remedy by *certiorari*. If the supervisors proceed without a sufficient petition, they exceed their jurisdiction, and the record will show it. The evidence as to the qualification of the signers is the assessment roll, made so by section 1 of the statute. That is part of the record, and *certiorari* would be a complete remedy, as it would show at once whether the signers were qualified (*Hagar* vs. *Supervisors Yolo County*, 47 Cal., 222).

But, as a matter of fact, the petition presented to the supervisors is not jurisdictional in so far as the issue of bonds or the fixing of a charge against any property is concerned, nor at all in the sense that the landowner is entitled to a hearing. It is merely a step prescribed by the Legislature, preliminary to the organization of a public corporation. Here again comes in the rule of construction by the Supreme Court of the State, which is binding upon the Federal Courts (*Central Dist.* vs. *De Lappe*, *supra*). The Legislature has exclusive power to form public corporations within the State. It is an act of sovereignty, an act of paramount authority. In the absence of constitutional restrictions, it may pass a special act creating a public corporation out of any territory specified in the act, authorizing the exercise of taxing power for municipal purposes within

those limits without even consulting the wishes of the people concerned. A corporation so created may be a county, or a city, or a school district, or a reclamation district, or an irrigation district. This proposition is so fundamental that it will not be disputed, and it requires the citation of no authority in support of it. In this State the Constitution requires such corporations to be formed under general laws. Hence the Legislature has prescribed certain steps to be taken for the forming of municipal corporations, the first of which is the presentation to the supervisors of a petition, "signed by at least fifty of the electors of the county, residents within the limits of such proposed corporation."

The language of the statute is as follows:

> "The petition shall set forth and particularly describe the proposed boundaries of such corporation, and state the number of inhabitants therein as nearly as may be, and shall pray that the same may be incorporated under the provisions of this act. Such petition shall be presented at a regular meeting of such board, and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in such county, together with a notice stating the time of the meeting at which the same will be presented. When such petition is

> presented, the Board of Supervisors shall hear the same, and may adjourn such hearing from time to time, not exceeding two months in all, and on the final hearing shall make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries, and shall ascertain and determine how many inhabitants reside within such boundaries; provided, that any changes made by said Board of Supervisors shall not include any territory outside of the boundaries described in such petition. The boundaries so established by the Board of Supervisors shall be the boundaries of such municipal corporation until by action, authorized by law, for the annexation of additional territory to or the taking of territory from said municipal corporation, such boundaries shall be changed." (Statutes of Cal., 1883, p. 94).

In other words, the Legislature uses the supervisors as an agency for the performance of this duty cast upon it by the Constitution.

After the municipal corporation is formed in this way it has the power of taxation and the power to issue bonds, precisely the same as irrigation districts. Yet it has never been held that this petition is jurisdictional, as in the case of *Mulligan* vs. *Smith*—jurisdictional to the issue of bonds. The reason is obvious, as already stated, that it is simply part of the plan adopted

by the Legislature for forming public corporations. It is the taxpayer himself, acting through his chosen representatives in the Legislature and the Board of Supervisors.

By means of this petition the Board of Supervisors acquires jurisdiction, not to issue bonds, but simply to call an election of the people residing within the boundaries proposed, in order that they may determine for themselves whether they will have a corporation. If by a two-thirds vote they decide in favor of the corporation, then the Supervisors for the first time acquire jurisdiction to make an order declaring the corporation formed. There their power ceases, and the whole matter is turned over to the Board of Directors, assessor and collector—the officers elected by the people concerned. This Board of Directors, in irrigation districts, must then estimate the cost of the proposed irrigation works and submit the proposition, as to whether bonds shall be issued to pay such cost, to another election of the people concerned. Unless a majority of the people vote in favor of these bonds, they have no jurisdiction in the premises. Here is the real jurisdictional fact. Here the taxpayer is entitled to be heard,—and he is heard just the same as the taxpayer is heard in any city or county. He has a voice in the election of the directors who are his repre-

sentatives, and through whom he himself determines whether the bonds shall be issued and his land made liable. It will be seen that this case is entirely different from that presented by the Montgomery Avenue Act. There there was no election and no opportunity for the taxpayer to act through his representatives, chosen for the purpose. It does not matter that the taxpayer is a non-resident. He may become a resident, and if he does not it is his own voluntary act. The rights of foreigners are entitled to full respect, but they are entitled to no greater respect than the rights of non-resident citizens. If they are to be allowed to interpose the "sheet anchor" of the Federal Constitution whenever the State seeks to carry out its policy of local improvements, and thereby defeat the declared purpose of the people, the necessity for separate State governments disappears. We may as well abolish them and surrender all to the central government.

The rule is well settled that a taxpayer cannot question the existence of a public corporation. That can be done only by the people in *quo warranto* proceedings (*Quint* vs. *Hoffman*, 103 Cal., 506; *People* vs. *Selma Irrigation Dist.*, 98 Cal., 206). The Supreme Court of California has decided that irrigation districts are public corporations, and this construction of the law,

as we have seen, is binding upon the Federal courts.

It is sufficient for the landowner to know that the corporation exists *de facto*. Why, then, does he need to be heard in the organization of the corporation?

In this case the bill avers that the statute has been complied with. That is an admission that the petition was signed by the requisite number of qualified persons. How, then, would a hearing have benefited the plaintiffs? And, if they could derive no benefit from a hearing, how are they injured by not being heard? Had the complainants averred that the law was not complied with, that the petition was not properly signed, and that they were denied a hearing in the premises, they would have stated a case, if their theory is correct; but, upon the averments of the bill, they have no case.

Finally and conclusively, under the express rulings of the Supreme Court of the United States in a case exactly in point, if the Wright Act must be construed as containing language which forbids a hearing which is necessary to due process of law, that part of the statute is unconstitutional and will be deemed stricken out, leaving the residue of the statute in force. In the *Kentucky Railroad Tax* case (115 U. S.,

page 304), the Court, by Mr. Justice Matthews, say: "It is said, however, in answer to this, by counsel for plaintiffs in error, in argument, that, whatever was in fact this alleged hearing, it could only have been accorded as a matter of grace and favor, because it was not demandable, as of right, under the law, and consequently has no such legal value as attaches to a hearing to which the law gives a right, and to which it compels the attention of the officer under an imperative obligation with the sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duty." But such is not the construction put upon the statute, as we have seen, by the Court of Appeals of the State, nor the practical construction, as we infer from the averments of the pleadings, put upon it by the officers called to act under it. And if the plaintiffs in error have the constitutional right to such hearing, for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it. The constitution and the statute will be construed together as one law. This was the principal of construction applied by this Court, following the decisions of the State court, in *Neal* vs. *Delaware*, 103 U. S., 370, where words, denying the right, were regarded as stricken out of the State Consti-

tution and statutes by the controlling language of the Constitution of the United States; and in the case of *Cooper* vs. *The Wandsworth Board of Works*, 14 C. B. N. S., 180, in a case where a hearing was deemed essential, it was said by Byles, J., "That, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature."

This branch of the case may be summed up as follows:

1. The landowner is not entitled to be heard as of right, in the formation of the district, except by his vote. The petition is jurisdictional only to authorize the supervisors to call an election and submit the proposition to the people of the proposed district to enable them to determine whether there shall be a district.

2. The sessions of the Board of Supervisors are public, and the landowner has a right to attend there and be heard. This is so by universal custom in all the States, and in this State it is so by judicial recognition and construction with reference to this particular matter. Such construction is conclusive upon the Federal courts. If he is entitled to be heard, and the language of the statute denies him a hearing,

that part of the law will be unconstitutional under the ruling in Kentucky Tax Cases, 115 U. S., 334.

3. The landowner has a hearing by his vote at the election of directors and again at the election to determine whether bonds shall be issued.

4. He has a hearing before the Board of Equalization before the assessment becomes final.

5. He has the remedy by *certiorari* to test the sufficiency of the petition for the formation of the district, and the question can be determined by the record, as the statute makes the assessment roll the only evidence of the fact whether the signers are "holders of title or evidence of title."

6. And, finally, he can refuse to pay and resist when suit in ejectment is brought, as in *Mulligan* vs. *Smith*. That portion of the law making the deed conclusive evidence of title is unconstitutional if it operates to prevent "due process of law;" but the remainder of the Act stands.

Is the Assessment Legal?

As already stated, Judge Ross discusses the power of taxation in connection with the irrigation districts, and, without deciding any point,

expresses the opinion, inasmuch as the water is to be distributed solely to the landowners, who are but a part of the community, that the use for which the taxes or assessments are levied is not a public use. He says:

> "The property to be held by the corporation whose creation is provided for by the legislation in question is not, as said by the Supreme Court of California *in re Madera Irrigation District*, 92 Cal., 322, to be held in trust for the public, but in trust for landowners of the district and for nobody else. Manifestly they do not constitute the public whether they number many or few, and for their exclusive use the private property of no man can be taken without his consent."

And further on, after referring to a New Jersey case, he says:

> "Like the case last cited, the scope of the legislation under consideration is not limited to cases where the territory designed to be supplied with water for irrigation is so extensive as to assume the importance of a public undertaking, and where, when provided, the water is available to every person within the district upon the same terms and conditions; but it embraces every case where a tract of country, be it large or small, is susceptible of one mode of irrigation from a

> common source, and by the same system of works, and a majority of the holders of title, or evidence of title, thereto petition for the organization of an irrigation district, and two-thirds of the qualified voters within the boundaries of the district as established by the Board of Supervisors vote in favor of it. A half dozen persons, as well as many hundreds, may constitute a majority of the holders of title, or evidence of title, to the lands falling within the designation of the statute, and the water to be secured by the means provided for, so far from being available to every person within the district, upon the same terms and conditions, is limited to the use of specific individuals, namely, the landowners of the district."

As we have already seen, the irrigation law does not assume to authorize the exercise of the general power of taxation, but merely the power of assessment for local improvements. The case of *Wurtz* vs. *Hoagland*, 114 U. S., 610, is full and sufficient authority upon the question. Mr. Justice Gray, delivering the opinion of the Court, says:

> "General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands

within the tract in question, have long existed in the State of New Jersey, and have been sustained and acted on by her courts under the Constitution of 1776, as well as under that of 1844."

And he quotes with approval the following language of Chancellor Zabriskie:

"But there is another branch of legislative power that may be appealed to as authorizing the taking of the lands required for the works to drain these meadows. It is the power of the government to prescribe public regulations for the better and more economical management of the property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation: such as the power of regulating the building of party walls; making and maintaining partition fences and ditches; constructing ditches and sewers for the draining of uplands and marshes, which can more advantageously be drained by a common sewer or ditch. This is a well known legislative power, recognized and treated of by all jurisconsults and writers upon law through the civilized world, a branch of legislative power exercised by this State before and since the Revolution, and before and since the adoption of the present Constitution, and repeatedly recognized by our

courts. The Legislature has power to regulate these subjects, either by general law, or by particular laws for certain localities or particular and defined tracts of land. When the Constitution vested the legislative power in the Senate and General Assembly, it conferred the power to make these public regulations as a well understood part of that legislative power. * * * The principle of them all is to make an improvement common to all concerned, at the common expense of all. * * * *All this was an ancient and well known exercise of legislative power.*"

Further on the learned Justice says:

"This review of the cases clearly shows that general laws for the drainage of large tracts of swamp and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the Legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole

> tract, cannot be improved or enjoyed by any of them without the concurrence of all at their joint expense. The case comes within the principle upon which this court upheld the validity of the general mill acts in *Head* vs. *Amoskeag Manufacturing Co.*, 113 U. S., 9. * * * As the statute is applicable to all lands of the same kind, and as no person can be assessed under it without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. *Barbier* vs. *Connelly*, 113 U. S., 27; *Walker* vs. *Sauvinet*, 92 U. S., 90; *Davidson* vs. *New Orleans*, 96 U. S., 97; *Hagar* vs. *Reclamation District*, 111 U. S., 701."

In the case of *Head* vs. *Amoskeag*, above referred to, the Court held that a statute of New Hampshire which authorizes any person to erect and maintain on his own land a water mill and mill dam upon and across any stream not navigable, paying, to the owners of lands flowed, damages assessed in a judicial proceeding, does not deprive them of their property without due process or take their property for a private use. The Court did not hold that the use was a public use, but said :

> " When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

In the same case the Court say :

> " The statutes which have long existed in many States, authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property."

In *Barbier* vs. *Connelly*, also referred to by Mr. Justice Gray, the Court, speaking by Mr. Justice Field, say :

> " But neither the Fourteenth Amendment —broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, some-

> times termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, *such as for draining marshes and irrigating arid plains.* Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, clearing streets, opening parks, and many other objects."

In *Hagar* vs. *Reclamation District No. 108* also cited above, Mr. Justice Field, speaking for the Court, says:

> " It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundation, as well as for the opening of streets in cities and of roads in the country. The system adopted in California to reclaim swamp and overflowed lands by forming districts, where the lands are susceptible of reclamation in one

> mode, is not essentially different from that of other States where lands of that description are found."

The foregoing authorities fully support the power of the State to authorize the owners of arid land

> "which cannot be fully and beneficially enjoyed in its existing condition to compel one another to submit to measures necessary to secure its beneficial enjoyment."

It is of no consequence what this power is called. It may be termed "taxation," "assessment," or merely an apportionment of benefits and burdens. It is, as said by Chancellor Zabriskie, in the language quoted and approved in *Wurtz* vs. *Hoagland*, "an ancient and well-known exercise of legislative power."

In this view it is not profitable to take much time in discussing whether there is a public use or not when the water—the *benefit*—is to be distributed to the landowners alone and not to the entire community. It is sufficient to add that the so-called "Wright Act" designates the burden an "assessment," and the Supreme Court of the State, in all its decisions upon the reclamation districts, and the irrigation districts, during a period of twenty-seven years, has held it to be an assessment for local improvements.

This construction is binding upon the Federal courts, since it does not conflict with the Constitution of the United States nor cover any principle of general jurisprudence within the rule permitting the Federal courts to disregard the decisions of local courts.

> "Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abuttors, according to frontage, or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency, unless there is some special restraining constitutional provision upon the subject."
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> 2 Dillon on Municip. Corp., sec. 752.

As the manner of distributing the burden is thus a question of "legislative expediency," so also is the method of distributing the benefits. In *Davidson* vs. *New Orleans*, 96 U. S., 97, it was held that

> "neither the corporate agency by which the work is done, the excessive price allowed for the work by statute, nor the relative importance of the work to the value of the land assessed, nor the fact that the assess

> ment is made before the work is done, nor that the assessment is unequal *as regards the benefits conferred*, nor that personal judgments are rendered for the amount assessed, is a matter in which the Federal Constitution controls the State authorities."

The manner of distributing the benefits is, therefore, for the State to determine in its own way. In the irrigation districts the benefits take the form of water, and it is to be distributed among the landowners for the obvious reason that no one else needs the water. The water is obtained for irrigation, and only land can be irrigated. For this purpose the landowners constitute the community or the public. If there be merchants or others living in the district they are indirectly benefited, although they have no land, by the increase of business incident to irrigation, or in other ways.

It is contended that, as the landowners do not constitute the entire community, water obtained and supplied to them exclusively is taken for a private use. But the landowners pay all the assessments—bear all the burden. Why should they not have the benefits? The distribution is certainly just. The man who pays nothing—who has no land to irrigate—is in no position to complain. If he be a tenant he obtains water just as one who rents a house in a city gets it

through his landlord, or the guest in a hotel gets water through the house. In irrigation districts it is well known that water for domestic uses is obtained from wells, as a rule, because the water is clear and cooler. Water in the canals is not fit for such use; but such as it is it is supplied free of charge. For watering stock, for bathing, or for washing clothing, it can be obtained free when suitable. Thus the man who is not a landowner gets all the benefit he requires and pays nothing. What more does he want? Why should he be allowed to complain and seek to prevent the man who does pay from getting water for his land? If he wants water to irrigate land he can get it by becoming a landowner. Here the complainants are landowners. How can they be heard in complaint? They are to share the benefits: they belong to the favored class to whom water is to be distributed.

Railways are public highways—so considered by the courts—and the Supreme Court of the United States has often declared the right of the States to authorize the issue of bonds in their aid, and to levy taxes to pay such bonds. That the railways are owned by private corporations and are managed for their private benefit makes no difference. The owners can and always do require the payment of a certain sum as fare or for freight. No one can travel on the railway with-

out paying a sum which goes into the private funds of the corporation. He must first become the owner of a ticket before he can travel, just as he must become the owner of land before he can irrigate. If he has no money he cannot buy the land; nor can he buy a railway ticket. There are many people who have no money and cannot ride on railways, yet they are part of the community. The benefits of the railway are distributed to less than the whole community—they are distributed to a specific class—those who have money with which to buy tickets. If distribution to all be the true test of a public use, then taxation in aid of railways is unconstitutional. But the question is *stare decisis* that the State has a right to adopt the policy of encouraging railways.

So with the school district. The benefits derived from this species of use take the form of education of children. The children get the benefits directly; all others only indirectly. Yet the children are only a part of the community. They do not bear any of the burden. Even their parents, who get the greater portion of the indirect benefits, may pay but a small part of the burden. Most of the lands within the district may belong to a bachelor or a non-resident, who has no children to attend school. He is but remotely benefited, though he may

pay most of the tax. He may even be opposed to public schools and believe them to be worse than useless. The State takes no notice of such things. It does not consult him, except as he may make himself felt through the ballot-box. It is settled law that the State has the right to adopt this policy relative to education.

And so on. There is really nothing, unless it be the common highway or a public street, which will bear the test that *all* the community must be benefited in order to justify the power of taxation. Even these will not. A street in San Francisco is of little value to the farmer in Los Angeles. Roads built at the expense of the State—as they have been and may be—may be constructed in the extreme northern part of the State, so that a man in the southern part would have to travel seven hundred miles at great expense in order to be benefited by the road. So it might be and is in many of our large counties. Yet all taxpayers are presumed to be benefited by such improvements in the general prosperity they promote. Those in the immediate neighborhood of the improvement can use it daily, are directly benefited, and should pay for it. So with irrigation districts. The State adopts the general policy of aiding irrigation by permitting those directly benefited to control the work and bear the burden.

In 1872 the Legislature of Kansas passed a law authorizing towns or counties to issue bonds in aid of railways "and other internal improvements," and also passed another statute declaring grist mills to be "public mills" and regulating their management. The township of Burlington issued $8,000 in bonds to aid such a mill. The State Supreme Court sustained the bonds and so did the Supreme Court of the United States in *Township of Burlington* vs. *Beasley*, 94 U. S., 310. The Court, by Mr. Justice Hunt, say:

> "A mill run by water power is declared to be an internal improvement by the statute we are considering. A ferry falls within the same principle, and so does a steam mill. It would require great nicety of reasoning to give a definition of the expression 'internal improvement' which should include a grist mill run by water, and exclude one operated by steam; or which should show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in and out of the town upon a railroad, while they were refused the means of grinding their wheat."

So we may say it would require great nicety of reasoning to show why the power of assessment may be exercised for the purpose of mak-

ing lands useful by taking water off them while denying the power to make lands useful by putting water on them; or to show that a public highway through a rainless region is more valuable to the people of California than a system of canals by which the arid plains may be converted into fruitful fields. It would be a poor consolation to know that the power of taxation can be employed in support of schools while it is refused in aid of that without which schools are impossible, because the lands are not habitable.

The Supreme Court also sustained a similar statute passed in Nebraska and the bonds in aid of a mill there.

Blair vs. *Cuming Co.*, 111 U. S., 363.

Policy of the Law.

As we have seen, the "Wright Act" is expressive of a part of the policy of the State long pursued for the reclamation of arid lands. Each State has its peculiar interests that call for a legislative policy. In some, the policy is to encourage the construction of grist mills, as in Kansas and Nebraska. Such a policy is unnecessary in California. Public aid to grist mills is never required and, therefore, never given. In the Eastern States, mills for manufacturing require aid, and the policy of the State favors them by permitting the flowing of lands upon

making compensation. In all the Western States the construction of railways required aid, and the policy of such States extended such aid. In California there are nearly 3,000,000 acres of overflowed lands, rich and easy of access, but useless in their natural state. To aid their reclamation the State adopted the policy of creating public corporations charged with the duty of constructing works for the drainage of the lands at the expense of those directly benefited. This policy was sustained by the State courts and by the Federal courts. The State also contains more than 20,000,000 acres of fertile but arid lands which are useless without irrigation. To bring them into cultivation—to make them fit for homes, farms and prosperous communities, sustaining public schools, highways and all the elements of wealth and civilization—the State extended to them that system which had been applied to the overflowed lands with the approval of the courts, State and National. This legislation has been uniformly approved by the State courts. Will the Federal courts destroy it? Will the national government, through its courts, say to this State: "We will permit Kansas and Nebraska to use the power of taxation in aid of their policy of aiding grist mills; we will permit New Hampshire and the other Eastern States to take private

property for the use of manufacturing plants; we will allow any of the States to aid railways owned by private corporations; we will sustain the power of taxation in support of schools and swamp land districts, but the State of California cannot reclaim arid lands by the agency of public corporations clothed with the power of assessment?" Is it probable that such a ruling will be made? I think not.

It is a matter of history that the practice of irrigation is as old as civilization. It was first taught to mankind by the Almighty in the annual overflow of the Nile more than 2,000 years before Christ (Kinney on Irrigation, sec. 10). In all ages and in all civilized countries where there are arid lands, irrigation has been fostered and encouraged by the governing power. The result is seen in Italy, where with only two-thirds the area of California a population of over 30,000,000 is supported, and in Japan, with an area less than that of California, there is a population of 41,000,000. To-day over half the population of the world is supported from irrigated lands.

In view of these facts, will the courts apply narrow and technical rules in the construction of a statute designed to carry out a policy fraught with such tremendous results? The Code of

California declares that the power of eminent domain may be exercised "to supply farming neighborhoods with water" for irrigation.

Code C. P., sec. 1238, subd. 4.

Lux vs. *Haggin*, 69 Cal., 304.

The Constitution of the State (Art. XIV) declares that water "appropriated for distribution" is a public use and "subject to regulation and control by the State." The statute under consideration (section 12) declares "the use of all water required for the irrigation of the lands of any district formed under the provisions of this act * * * to be a public use, subject to the regulation and control of the State." This is the settled policy of the State.

Abuse of the Law.

It is sometimes said the law has been abused. What law has not been abused? Even the law concerning marriages, which lies at the foundation of society, has been often abused. Shall we therefore abolish marriages? Private corporations to irrigate lands have grossly abused the law, and under their management there is no prospect for the landowner but perpetual tribute. The street railway corporations of San Francisco have authorized the issue of more than twice the amount of bonds authorized by

all the irrigation districts of the State, and have issued four times the amount actually issued by the irrigated districts, though the bonds of irrigation districts are secured by 1,500,000 acres of the best lands in the State. The proceeds of the bonds of the street railways, judiciously expended, would probably construct twice as much road. One water company of San Francisco has issued more bonds than all the irrigation districts. The railways of the State have issued bonds for about $100,000,000—probably twice the cost of the roads covered by the securities. The mining corporations of the State have collected from their stockholders an aggregate sum exceeding $100,000,000, and much of it has been wasted. Is this abuse a reason for abolishing the law under which such corporations have been organized? The 180,000 miles of railway in the United States have been bonded for nearly $6,000,000,000—a much greater sum than the actual cost; and so reckless have the private corporations controlling them been in disposing of securities that the market has been destroyed. Some of the most important of our railway systems—covered by outstanding obligations exceeding a thousand millions of dollars—have gone into the hands of receivers and ceased to pay interest on their bonds. The reputation of this country has

suffered more from this cause than all others. In comparison, how insignificant are the outstanding obligations of the irrigation districts of California, which only need the support of the Federal courts to make them good, covering as they do lands sufficient to make them absolute security. That there have been abuses in public corporations of all kinds—counties, cities, towns and districts—is notorious; but that is no reason for destroying them. Said Chief Jusitce Waite in *Munn* vs. *Illinois*, 94 U. S., 112: "We know that this power may be abused; but that is not an argument against its existence. For protection against abuse the people must resort to the polls, not to the courts."

If there be imperfections in the irrigation laws of California—and doubtless there are—they can be amended. The law has been in operation now more than seven years. Three sessions of the Legislature have been held since its enactment, and though the State has passed through the worst panic ever before known, the law has stood the test so well that no one has even proposed to repeal it. This is a sufficient answer to those who denounce it as oppressive.

The opposition to it comes from those who hold lands for speculative purposes and do not wish to improve them. The State certainly has a right to adopt a policy which will enable the

people who desire to build homes to own the water with which to irrigate their lands and thus be free from the perpetual tribute which would follow the ownership of the water by private corporations. After the bonded indebtedness is paid off, the cost of water under the district system will be merely nominal.

To hold this law unconstitutional, and thus destroy investments already made aggregating millions of dollars in value — declare invalid bonds issued and purchased upon the faith of numerous decisions of the State Supreme Court —would not only be unprecedented, but would so impair confidence in that court that hereafter no bonds in this State of a public character could be sold until after their approval by the Supreme Court of the United States.

Such a result would be far more disastrous than any possible abuse of the law. People who have made investments under those decisions are certainly entitled to as much consideration as those who buy lands in the State charged with the knowledge, as they are, that they take the title subject to the right of the State to enact and enforce such a policy of internal improvements.

Respectfully,

JAMES A. WAYMIRE.